

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

RONNIE C KINGERY
Claimant

APPEAL NO. 10A-UI-08147-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PRECISION INC
Employer

OC: 04/25/10
Claimant: Appellant (1)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Ronnie Kingery filed a timely appeal from the May 26, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 22, 2010. Mr. Kingery did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Harry Blake, Plant Manager, represented the employer and presented additional testimony through Carolyn Freml, Human Resources Representative. Exhibits One through Six were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ronnie Kingery was employed by Precision, Inc., as full-time employee in the lagging and drum department for two years until April 29, 2010, when Harry Blake, Plant Manager, discharged him from the employment for attendance. Mr. Blake was Mr. Kingery's immediate supervisor. Mr. Kingery's scheduled work hours were 6:00 a.m. to 4:30 p.m., Monday through Friday.

The employer has an attendance policy set forth in an employee handbook. Under the policy, Mr. Kingery was required to telephone the employer at least an hour before the scheduled start of his shift and speak with Mr. Blake. Mr. Kingery was aware of the policy.

The final absence that triggered the discharge was Mr. Kingery's no-call, no-show absence on April 28, 2010. Mr. Kingery had also been absent without notifying the employer on March 26, 2010. Mr. Kingery had been tardy for personal reasons on July 27, October 9, and December 8, 2009. The employer had issued reprimands for tardiness on October 15 and December 17, 2009, and issued an additional reprimand for attendance on March 29, 2010.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly

be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Employers may not graft on additional requirements to what is an excused absence under the established unemployment insurance law. This includes requiring a physician's note. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa App. 2007).

The evidence in the record establishes that all of the above absences were unexcused absences under the applicable law. In light of the two no-call, no-show absences within about a month of each other at the end of the employment, and the multiple warnings for attendance, the administrative law judge concludes that Mr. Kingery's unexcused absences were excessive and constituted misconduct. Accordingly, Mr. Kingery is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Kingery.

DECISION:

The Agency representative's May 26, 2010, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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